IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

CIT, JODHPUR VS. M/S KAMAL & COMPANY

"D.B. INCOME TAX REFERENCE NO.67/99 AGAINST THE ORDER PASSED BY THE ITAT, JAIPUR DATED 16.02.99 IN RA NO.151,152 & 153/JDPR/98."

DATE OF ORDER ::::: 27SEPTEMBER, 2007.

P R E S E N T

HON'BLE MR.JUSTICE BHAGWATI PRASAD, J.

HON'BLE MR.JUSTICE MUNISHWAR NATH BHANDARI, J.

Mr.K.K.Bissa for the applicant.
Mr.Anjay Kothari for the respondents.

BY THE COURT : [PER HON'BLE MR. BHANDARI,J.]

Income Tax Appellate Tribunal, Jaipur Bench, Jaipur referred following question for its answer/opinion of this Court vide its order dated 16.02.99.

"Whether on the facts and in the circumstances of the case the ITAT was justified in holding that additions made on the basis of material collected during the course of such survey was illegal?"

Revenue had moved an application for seeking reference on three questions pertaining to the order of the Tribunal in ITA No.765,663 and 664/JP/92. Out of three questions, Tribunal referred only question No.3 with some modification.

The brief facts given rise to the question referred is that a survey under Section 133-A of the Income Tax Act was conducted on 25.02.1987. during the course of survey, excess stock was found, thereby addition was made by a sum of Rs.3,24,544/- by the Assessing Officer. Aggrieved by the said addition, assessee preferred appeal before the CIT [Appeals] where the appeal of the assessee was partly allowed. Assessee and Department preferred Second Appeal before the Income Tax Appellate Tribunal. In this Second Appeal, assessee was permitted to take additional ground, questioning the competence of Inspector to hold survey in violation of Section 133-A of the Income Tax Act. The learned Tribunal thereafter decided appeal in favour of assessee, the additions made by the Assessing Officer based on inventory of stock taken during the course of survey held to be illegal as Inspector was not competent to conduct survey.

The Revenue thereafter preferred an application for reference of question for seeking opinion of the High Court after referring two judgments of the Hon'ble Apex Court. The learned Tribunal thereafter

referred one issue where the question raised is as to whether additions made on the basis of material collected during the course of survey is legal or not.

Learned counsel appearing for the Revenue urged that irrespective of the fact that Inspector was not competent to conduct survey as per the provisions of Section 133-A of the Income Tax Act, yet material collected during the course of survey can be made use of by the Assessing Officer. In this regard reference of the judgments of Hon'ble Apex Court was given. In the case reported in Vol.155 [1985] ITR 166 Dr.Pratap Singh & Anr. Vs. Director Enforcement & Ors., it was held that illegality of search does not vitiate the evidence collected during such illegal search. The only requirement is that the court or the authority before which such material or evidence brought is to be cautious and circumspect in dealing with such material or evidence.

In other cases reported in 1993 ITE 505 Poornmal Vs. Director Inspection the Hon'ble Apex Court held that material obtained in search made in contravention of provisions can be used.

According to the learned counsel for the Revenue, the ratio of two judgments applies even in the matter of survey because after collection of material in search and seizure and collection of material in survey, it stands on the same footing for the purposes of use of material by the

Assessing Officer. Thus, according to the learned counsel for the Revenue, material collected can be used for making additions however, the additions so made by the Assessing Officer based on the inventory of stock taken during the course of survey was deducted by the Tribunal. Thus, it was prayed that reference should be answered in favour of the Revenue.

On the other hand, counsel appearing for the assessee urged that he case of seizure under Section 132 does not stand at par with the case of survey under Section 133-A of the Income Tax Act. It was though admitted that while conducting search under Section 132, material collected can be used by the Assessing Officer but the same principle cannot be applied in the case of survey. According to him, Section 133-A [4] prohibits income tax authority for removing any books of accounts or other documents or any cash, stock or other valuable articles or things. Once a prohibition is imposed then contrary action of the Inspector cannot permit the Assessing Officer to use the material. A reference of the case reported in 2001 ITR [Raj.] 348 was given where the learned Single Judge held that while exercising the power under Section 133-A a document cannot be impounded thus order to summon books and further order of impounding books found to be illegal. The learned counsel for the assessee also submitted written submissions.

We have carefully heard and perused the written submissions made by the parties and looked into the legal provisions pertaining to the issue in reference.

From the facts available on record, it has come out that the action of the Inspector to conduct survey under Section 133-A was not legal under Section 133-A though no prohibition has been imposed on the Inspector to conduct such a survey however unless an authority is given under the provisions of Section 133-A, survey conducted by the Inspector is not held to be illegal and the Tribunal has recorded its finding accordingly. Now mute question comes as to whether material collected during the course of illegal survey can be taken into consideration by the Assessing Officer or in other words whether additions can be made on the basis of material collected during the course of illegal survey. In the present matter, inventory of stock was prepared by the Inspector during the course of survey and based on said material Assessing Officer made additions. Now, considering the provisions of Sections 132 and 133-A we find that though there is a difference between the provisions rather the scope of two provisions is different but the question in reference is only in regard to use of material during the course of illegal survey.

Considering the judgment of the Hon'ble Apex Court in two cases referred above we find that the material collected during the course of

illegal search can be made use of thus if the ratio decidendi of the judgments of the Hon'ble Apex Court is applied then it becomes clear that even in the case of illegal survey, material collected can be used for additions. While delivering the judgment of the Hon'ble Apex Court was cautious about the fact that material collected is coming out from illegal search and yet material collected was allowed to be used by the Assessing Officer. The same analogy applies here for the reason that so far as the procedure undertaken by the Assessing Officer is concerned, it remain same in regard to use of material either collected in search or in survey. The inventory of stock was prepared by the Inspector during the course of illegal survey and material was then used by the Assessing Officer for making additions. Hence in those circumstances, we are of the opinion that in view of the two judgments of the Hon'ble Apex Court Revenue was entitled to use material collected during the course of illegal survey.

In view of the discussions made above, we answer the question in favour of the Revenue and against the assessee.

[MUNISHWAR NATH BHANDARI] J. **[BHAGWATI PRASAD], J.**

MAMTA